

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS, INC., and
PENGUIN RANDOM HOUSE LLC

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through
5, inclusive

Defendants.

Case No. 1:20-CV-04160-JGK

**DECLARATION OF BREWSTER KAHLE IN SUPPORT OF DEFENDANT INTERNET
ARCHIVE'S MOTION FOR SUMMARY JUDGMENT**

I, Brewster Kahle, declare as follows:

1. I make this declaration from personal knowledge, and if called to testify, I could and would testify competently thereto.

2. I founded the Internet Archive in 1996. I currently serve as its Digital Librarian and Chair of the organization's Board of Directors.

I. THE INTERNET ARCHIVE

3. The Internet Archive is a 501(c)(3) public charity.

4. The guiding mission of the Internet Archive is to provide universal access to all knowledge.

5. In furtherance of that mission, over more than two decades, the Internet Archive has preserved, curated, and made available much of humanity's most important information.

6. The Internet Archive has become a trusted resource for millions of people and institutions and a model for other archives and libraries with similar goals.

7. One of the Internet Archive's first projects was to archive every public webpage on the fledgling World Wide Web. Today, over a quarter century of web history is preserved and accessible through the Internet Archive's Wayback Machine. The Wayback Machine has become a crucial database for journalists, researchers, lawyers, and courts.

8. The Internet Archive works with libraries, museums, universities, and the public to preserve and offer free online access to texts, audio, moving images, software, and other cultural artifacts.

9. The Internet Archive has been a member of the American Library Association since 2000. The Internet Archive is also an affiliate member of the Boston Library Consortium, and participates in interlibrary loan via the OCLC and RapidILL interlibrary loan networks.

10. In December 2006, the State of California formally recognized the Internet Archive as a library, making it eligible to receive funding under the Library Services and Technology Act and qualifying it for E-Rate, a federal program that provides discounts to schools and libraries to ensure they are able to obtain affordable telecommunications services.

11. In mid-2007, the Internet Archive was awarded a Library Services and Technology Act grant for its Open Library project (openlibrary.org)—an effort to create a comprehensive library book catalog with a webpage for every book published. A true and correct copy of the grant is attached as **Exhibit 1**.

12. The Internet Archive has also received grant funding from the Institute of Museum and Library Services (“IMLS”), an independent federal agency whose mission is to support museums, libraries, and related organizations. For example, in 2017, the Internet Archive received a grant under the IMLS’s Laura Bush 21st Century Library Program. In order to receive this grant, the Internet Archive had to qualify as a library or library-related organization. A true and correct copy of the IMLS webpage recording the awarding of the 2017 grant is attached at **Exhibit 2**.

II. THE INTERNET ARCHIVE’S IMPLEMENTATION OF CONTROLLED DIGITAL LENDING

13. In 2011, in partnership with over two dozen library systems including the Boston Public Library, the Internet Archive made an initial collection of more than 80,000 books available for digital lending. A true and correct copy of the Internet Archive blog post I reviewed announcing this program is attached as **Exhibit 3**.

14. In November 2011, the Internet Archive’s digital lending effort was unanimously endorsed by all fifty state libraries through the Chief Officers of State Library Agencies (“COSLA”). A true and correct copy of this endorsement is attached as **Exhibit 4**.

15. As of this filing, the Internet Archive has more than three million books available for digital borrowing in its collection.

16. The Internet Archive launched and expanded this program on the basis that it is fair use. In developing and maintaining this belief, I relied on *A White Paper on Controlled Digital Lending of Library Books*, authored by Dave Hansen, then the Associate University Librarian and Lead Copyright & Information Policy Officer for Duke University, and Kyle Courtney, then a copyright advisor for Harvard University Library—each copyright scholars known to me and my colleagues to be respected in their fields. A true and correct copy of the White Paper is attached as **Exhibit 5**. The White Paper concludes that “there are strong arguments supported by caselaw for why CDL, appropriately tailored to reflect physical market conditions, should be permissible under existing law under the doctrine of fair use.”

17. I also relied on the *Position Statement on Controlled Digital Lending*. This document was co-authored by Mr. Courtney; Mr. Hansen; Mary Minow, then affiliated with the Berkman Klein Center for Internet and Society at Harvard University; Jason Schultz, a Professor of Clinical Law at New York University School of Law; and Michelle Wu, then a law professor and librarian at the Georgetown Law Center. Lila Bailey, the Internet Archive’s most senior lawyer, was also a co-author of this statement. My colleagues and I understood all co-authors of the *Position Statement* to be well-respected copyright scholars. Dozens of copyright law professors and scores of libraries and library associations became signatories to the statement, including the Association of Research Libraries, Boston Public Library, Los Angeles Public Library, the Metropolitan New York Library Council, and the Chief Officers of State Library Agencies, representing the state librarians of all fifty states. Attached are true and correct copies of the Position Statement as **Exhibit 6** and the list of signatories as **Exhibit 7**.

A. Scanning and storing books

18. The Internet Archive—or another 501(c)(3) public charity it works closely with, Open Library of Richmond—lawfully acquires print books by purchase or donation that it wishes to make available for digital lending.

19. Open Library of Richmond holds legal title to and maintains physical possession of many of the print books in its physical archive facilities.

20. Print books stored in the physical archive facilities are non-circulating; they are not available to be accessed in their print form.

B. Lending experience

21. Anyone can become a patron of the Internet Archive—and digitally borrow books—for free by signing up for an Internet Archive account. (Internet Archive has policies, not relevant here, for terminating accounts.)

22. Doing so grants them a digital library card that lets them borrow up to ten books at a time from the collection, for limited periods of up to fourteen days.

23. A patron can read the book in their web browser through a tool called BookReader. BookReader lets patrons flip through a book's pages, zoom in on a book's images, enlarge the book's text for easier reading, and search through the book.

24. A loan will automatically expire at the end of the loan period. At that point, the patron is no longer able to access the book, and it is once again available to be borrowed.

25. The Internet Archive uses Adobe DRM to encrypt PDF and ePub formats of books that patrons can download. The Adobe DRM allows only the authorized patron to download and read the borrowed book using authorized software and prevents the patron from copying or further distributing the book or from accessing it after their loan has ended.

C. Lending policies

26. The Internet Archive does not digitally loan all of the books it has scanned. Instead, it implements a number of policies that limit the books available for digital lending.
27. As relevant here, to be available for digital lending, a digital book must have been scanned from a print copy owned by the Internet Archive or Open Library of Richmond.
28. It is the Internet Archive's policy not to lend books published within the previous five years. This limitation is intended to exclude from lending the latest bestsellers, as a belt-and-suspenders accommodation to publishers.
29. As a result of human error, two Works in Suit published in 2019—*All the President's Women: Donald Trump and the Making of a Predator* and *The Man Who Solved the Market*—were made available for digital lending.
30. Two factors determine the number of digital copies of a particular book that can be borrowed at any given time from the Digital Lending Library.
31. First, the Internet Archive makes available one digital copy for each non-circulating print copy of a book it has in archival storage.
32. Second, for any of those books the Internet Archive has made available for CDL, the Internet Archive works with dozens of library partners—from the University of Arizona to the Delaware County District Library in Ohio—to contribute their own non-circulating copies of that book toward the number of lendable copies. Even if a partner library has multiple copies of a particular book, the Internet Archive counts only one additional copy per library.
33. For example, if the Internet Archive has one non-circulating physical copy of *Little House on the Prairie*, and three partner libraries have each chosen to contribute a physical copy of *Little House on the Prairie*, then *Little House on the Prairie* could be digitally loaned to up to four patrons at a time. Each concurrent loan would thus still be associated with one non-

circulating physical copy. If all four copies of *Little House on the Prairie* were checked out, patrons seeking to borrow *Little House on the Prairie* could join a waitlist until one or more copies were checked back in.

D. Benefits to the public

34. Over the course of the last decade, I have spoken with and heard stories from our patrons. I have learned that digital lending is particularly helpful for patrons who live far from a brick-and-mortar library, patrons seeking a book not available from their local library, and patrons who have print disabilities that make it more difficult to hold or read print books.

35. I have also learned that digital lending is particularly helpful for brief or spontaneous access to books—for example, for checking citations or references, or looking up discrete facts—that wouldn't be worth a trip to a brick-and-mortar library.

36. Digital lending also allows the Internet Archive to promote education, research, preservation, and scholarship.

37. The Internet Archive has made knowledge resources like Wikipedia more reliable by enabling readers to confirm that books cited as authorities actually support the encyclopedia's entries. A true and correct copy of an Internet Archive blog post I wrote about this project is attached as **Exhibit 8**.

38. Attached hereto as **Exhibit 9** is a document prepared at my direction and with my participation compiling information regarding Wikipedia citations to books available to borrow from the Internet Archive via CDL. It accurately reflects a subset of the links from English-language Wikipedia articles to books available to borrow from the Internet Archive via CDL.

39. There are 202,026 links in Wikipedia articles in English to books available to borrow from the Internet Archive via CDL. Those links lead to 88,284 different books available to borrow from the Internet Archive via CDL.

40. In 2019, with funding from the U.S. Department of the Interior, the Internet Archive digitized and made available books related to the incarceration of Japanese Americans during World War II. A true and correct copy of an Internet Archive blog post I reviewed is attached as **Exhibit 10**.

41. In 2022, a group of volunteer librarians curated collections of books that have been censored by school districts across the country but are still borrowable from the Internet Archive. A true and correct copy of an Internet Archive blog post I reviewed is attached as **Exhibit 11**.

III. THE NATIONAL EMERGENCY LIBRARY

42. At the beginning of the COVID-19 pandemic, school districts reached out to the Internet Archive concerned that students and teachers could no longer physically access books—including hundreds of copies of assigned books that the school had already purchased.

43. Libraries reached out to us worried about how they could best serve their communities when they could not physically loan out millions of print books now locked away.

44. By our estimation based on data from the federal Institute of Museum and Library Services, with the closure of libraries, 650 million books were out of circulation.

45. Hearing these pleas and understanding our unique technological capacity to take immediate action, we proposed temporarily lifting the technical controls enforcing its one-to-one ratio. Since all of the libraries were closed, I believed there were sure to be more non-circulating copies locked up in shuttered libraries than would be borrowed via the Internet Archive even

without technical enforcement of the one-to-one ratio. (We closely monitored borrowing behavior, and I continue to believe that the number of concurrent loans of a given book by Internet Archive via the National Emergency Library (“NEL”) at any given time never exceeded the number of print copies then rendered inaccessible to readers due to the health emergency.)

46. The Internet Archive was uniquely positioned to be able to address this problem quickly and efficiently.

47. The Internet Archive launched the NEL on March 24, 2020, intending for this program to “run through June 30, 2020, or the end of the US national emergency, whichever is later.” A true and correct copy of a blog post announcing the NEL that I reviewed is attached as **Exhibit 12**.

48. The Internet Archive consulted with schools and libraries for their input and endorsement, and more than 100 institutions signed a statement in support of the National Emergency Library in advance of its launch. A true and correct copy of the statement of support that I co-authored is attached as **Exhibit 13**.

49. We believed then, and believe now, that under those unique circumstances, operating the NEL was fair use.

50. The NEL benefitted teachers, students, researchers, and readers who could not access their physical schools or libraries.

51. Dozens more teachers, students, researchers, parents, and other readers have shared their stories with the Internet Archive about why the NEL served a critical need during an uncertain time. A true and correct copy of blog posts collecting such stories that I reviewed are attached as:

- **Exhibit 14** (“Teachers & the National Emergency Library: Stories from the Frontlines of Online Schooling,” April 13, 2020)
- **Exhibit 15** (“Impacts of the temporary National Emergency Library and controlled digital lending,” June 11, 2020)
- **Exhibit 16** (“More Impacts of the National Emergency Library,” June 22, 2020)
- **Exhibit 17** (“Even More Impacts of the National Emergency Library and Controlled Digital Lending,” August 10, 2020)

52. The Internet Archive shut down the NEL on June 16, 2020.

IV. EBOOK PURCHASING

53. The Internet Archive purchases ebooks from publishers who are willing to sell them outright (rather than license them).

54. The Internet Archive would purchase ebooks from Plaintiffs if they were willing to sell them (rather than license them).

55. Several times over the past ten years, I have personally asked major publishers, including Plaintiffs, if they would sell ebooks to Internet Archive (rather than license them). Plaintiffs have declined each time I have asked.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on July 7, 2022, in San Francisco, California.

DocuSigned by:
Brewster Kahle
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BREWSTER KAHLE

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2022 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Joseph C. Gratz
JOSEPH C. GRATZ